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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MARILYN SPERKA, Plaintiff and Appellant, v. THE AEROSPACE CORPORATION, Defendant and Respondent.	B287785 (Los Angeles County Super. Ct. No. BC555514)
MUIBI SALAMI, Plaintiff and Appellant, v. THE AEROSPACE CORPORATION, Defendant and Respondent.	B288022 (Los Angeles County Super. Ct. No. YC070451)

APPEAL from judgments of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Law Office of David R. Denis and David R. Denis for Plaintiffs and Appellants.

Proskauer Rose, Kate S. Gold and Andrew A. Smith for Defendant and Respondent.

In this consolidated appeal, Marilyn Sperka and Muibi Salami (collectively "appellants") appeal from separate judgments entered against them in their age discrimination cases against their former employer, the Aerospace Corporation (Aerospace).[1] Sperka and Salami were terminated from Aerospace along with more than 300 other employees in a company-wide reduction in force (RIF) that took place in March 2012 following budget cuts to Aerospace. Their complaints against Aerospace were deemed related and were assigned to a single department of the Los Angeles Superior Court.[2]

Appellants' disparate impact age discrimination claims were dismissed at the pleading stage due to appellants' failure to exhaust administrative remedies.

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[1] Sperka also claimed she had been terminated due to a medical condition: cancer in remission.

[2] A third former employee of Aerospace, Mikel Cvetanovic, also filed a complaint for age discrimination against Aerospace in connection with the same RIF. Cvetanovic's case was deemed related to Sperka's and Salami's, and was handled in the same courtroom. However, Cvetanovic's case was never formally consolidated or combined with any other case. Cvetanovic has also appealed the trial court decision in his case, and is party to a related appeal that is the subject of a separate opinion in Case No. B289220. Cvetanovic will be referred to as necessary in this opinion.

The trial court subsequently granted summary judgment as to appellants' remaining claims. Sperka and Salami filed separate notices of appeal. At the request of the parties, this court ordered that the two appeals be consolidated for purposes of briefing, oral argument, and decision.

In that we find no error in the trial court's decisions, we affirm the judgments.

FACTUAL BACKGROUND

The parties

Aerospace is a federally-funded research and development center responsible for providing objective technical analyses and assessments primarily to the federal government on launch, space, and related ground systems that serve the national interest. More than 90 percent of Aerospace's funding comes from the Department of Defense. Aerospace's operations are divided into organizational groups, which are further divided into divisions, directorates, subdivisions, and departments. Personnel decisions, including termination decisions, are made by managers at the division, directorate, subdivision or department level.

Aerospace hired Sperka in 2007, when she was 57 years old. Mary Jo Gura, who had been Sperka's supervisor at her previous employer, contacted Sperka about a position with Aerospace, helped her apply, and acted as a reference. Based on their prior work experience, Gura knew throughout Sperka's recruitment that Sperka had a history of cancer, which had been in remission since 2003.

Sperka initially worked in Aerospace's Engineering Applications Department. About three years later, when she was 60 years old, Sperka was transferred to the Software Systems

Assurance Department. Gura approved the transfer and, along with Samuel Cantrell, became Sperka's new direct supervisor.

Aerospace hired Salami in 2000 when Salami was 51 years old. Salami initially worked in Aerospace's Systems Engineering Division. Three years later, when he was 54 years old, he transferred to the Communication and Network Architectures Subdivision, where he spent the rest of his employment. His supervisor was Ted Winer, and his second-level supervisor was Alan Foonberg.

Appellants held "Level 2" non-supervisory engineering positions throughout their entire employment. They were expected to maintain a full workload of 40 customer billable hours per week.

The collective bargaining agreement (CBA)

A CBA existed between Aerospace and the Aerospace Professional Staff Association (union). Appellants were subject to the CBA.

The CBA permitted employees to be selected for an RIF "on a non-discriminatory basis." The CBA also included a "rehire" policy, which permitted employees whose employment had been terminated to have their names on a roster. For a period of one year following termination of their employment, Aerospace was required to send current vacancies to each person on the roster. The rehire policy provided that "[n]o outside applicant shall be hired for a position as to which there is a person on said roster who has notified [Aerospace] of his or her interest and suitability unless a written explanation has been approved by the level 4 manager."

The CBA also required that each bargaining-unit employee undergo a performance review known as the Aerospace

Performance Improvement Process (APIP) once a year. Consistent with the CBA, Aerospace assigns a yearly value ranking to each bargaining unit employee relative to other employees in the same division, directorate or subdivision. The ranking is based on the employees' performance, the strength and breadth of their skills, and the utility of their skills and performance to the company. The ranking places each employee in one of five "bins." Bin 1 comprises the highest-ranking employees, and bin 5 comprises the lowest-raking employees.

The RIF

In late 2011, respondent became aware of projected budget cuts that would have a significant impact on its funding. Respondent began to prepare for a company-wide RIF that would affect roughly 10 percent of its employees. The selection of employees eligible for the RIF began with respondent's bin ranking system, which ranked employees based on their performance skills. The RIF selection pool included employees ranked in bins 4 and 5 in 2011, as well as new employees who had not yet been ranked, and employees on displaced status, meaning their functional role was no longer needed in the organization. Managers were asked to review the RIF-eligible employees in their units and determine a RIF priority rank for the RIF-eligible employees in their units. Aerospace's Human Resources Department provided a uniform RIF selection matrix for managers to determine the RIF priority rank for RIF-eligible employees. The RIF priority rank was based on bin rankings for the past three years, performance issues or corrective action on file, years of service and experience, security clearance level, and skills and areas of expertise applicable to the units' anticipated workload in the future.

Overall, the RIF resulted in Aerospace's termination of 306 of its 4,000 employees, including 194 bargaining-unit employees like appellants.

Appellants' performance problems

Sperka

Sperka worked primarily on a project which required only 20 hours per week of her time. She asked her direct supervisors, Gura and Cantrell, for help finding other customer billable work. Gura did so, but could only find small, short term additional projects for Sperka.

Sperka's APIPs over the final four years of her employment identified consistent problems with her work. The issues included her failure to obtain and retain additional internal customers and her limited breadth of work. In 2008, her APIP noted that she should "more proactively seek out additional opportunities to contribute her expertise and experience." In 2009, it was noted that her workload "varies significantly," and that she should "generate additional products autonomously to increase the value provided by Aerospace to our customers." In 2010, Sperka's "productivity" was rated "FS" (falls short of expectations). In 2011, it was recommended that Sperka "improve the breadth of her contributions and develop her customer base by further acquiring job knowledge and experience." Although these APIPs provided Sperka an opportunity to comment on her perceived deficiencies, she never did.

These issues led to low bin rankings. In the last three years of her employment, Sperka was ranked in bin 4. This bin ranking reflected her managers' assessment that she was of lower value to the company than other employees.

Salami

Like Sperka, Salami had only about 20 hours a week of customer billable work starting in March 2011. Salami's supervisor, Winer, reached out to managers in other departments in an effort to locate additional billable work for Salami, however, Salami's low billable hours continued. Winer began wondering whether to put Salami on displaced status.[3] Salami avoided displaced status by locating some short-term, temporary projects.

In November 2011, Salami took an opportunity to support Aerospace's Nuclear Operations Directorate at the Offut Air Force Base in Omaha, Nebraska. After approximately one week, Air Force personnel reported to Aerospace that they were "completely dissatisfied with his performance" due to his failure to contribute to discussions and habit of falling asleep during sessions. Aerospace removed Salami from the project, and provided him with performance management counseling. Salami insisted his performance was not substandard and blamed Winer for micromanaging and giving him unnecessary performance coaching.

Salami's APIPs reflected his poor performance. In his 2006 through 2009 APIPs, it was repeatedly noted that he needed to improve his communication skills and be more proactive in his career. Beginning in 2010, Salami's APIPs reflected that he was not meeting expectations. In 2010, Salami received an "FS" ranking in leadership skills and it was noted that his department charts were "often late." In 2011, Salami received an "FS"

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[3] An employee who lacks sufficient work to be considered full time may be placed on displaced status, which allows the employee to remain employed for 91 days while he or she attempts to find another position within the company.

ranking in the leadership skills, growth and maturity, and productivity categories. These issues resulted in low bin rankings. Salami was consistently ranked in bins 4 and 5 beginning in 2006. In 2009 and 2010, he was ranked in bin 4, and in 2011, he was ranked in bin 5.

Appellants' selection for the RIF

Sperka

The managers responsible for RIF selection in Sperka's division were David Christopher and B. Zane Faught. Christopher and Faught included Sperka in the RIF selection pool because she had been ranked in bin 4 the previous two years. Christopher and Faught used the RIF selection matrix to evaluate which employees should be prioritized in the RIF ranking. Sperka was given a high priority in the RIF selection pool due to her narrow customer base, limited skill set, and low productivity. Christopher and Faught noted: "Currently supports just one customer. Performance was weak in previous assignments (e.g. low productivity, weak technical contributions). Current task could be performed by other staff." Everyone in Sperka's subdivision who, like Sperka, was ranked in one of the two lowest bins and had a narrow customer base or skill set was selected for the RIF, regardless of age.

Aerospace informed Sperka in March 2012 that she had been selected for the RIF and that her employment would terminate in nine weeks. Aerospace did not hire anyone to replace Sperka; her position was eliminated and her work was transferred to an employee who was 50 years old at the time of the RIF. After the RIF, 80 employees remained in Sperka's subdivision: one was 71; 19 were in their 60's (including

employees older than Sperka); 36 were in their 50's; 10 were in their 40's; 12 were in their 30's; and two were in their 20's.[4]

Salami

The manager responsible for the RIF selection in Salami's subdivision was Foonberg, who received input from Winer. Foonberg included Salami in the selection pool because he had been ranked in bin 5 for the previous year and in bin 4 the year before that. Foonberg then evaluated all the employees in the selection pool based on the RIF selection matrix.

Foonberg assigned Salami a high priority for the RIF due to his low productivity and initiative, poor written and verbal communication skills, inability to maintain a full workload and failure to broaden his technical skills to increase his value. The RIF selection matrix as to Salami noted: "Has burned bridges with several customers. On informal performance management to address productivity and initiative issues. Management has canvassed many potential customers, but no work has materialized . . . Lack of urgency makes it challenging for him to provide impact." Everyone in Salami's subdivision who, like Salami, had been ranked in bin 5 or received prior performance counseling was selected for the RIF, regardless of age.

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[4] Sperka's employment history is taken exclusively from respondent's brief. While appellants provide a brief summary of Sperka's employment history, it contains no specific page citations to the record, therefore we do not consider it. (Cal. Rules Court, rule 8.204(a)(1)(C); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ["'[i]f a party fails to support an argument with necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]'"].)

Salami was informed in March 2012 that he had been selected for the RIF and that his employment would terminate in nine weeks. Aerospace did not hire anyone to replace Salami -- his position was eliminated, and his duties were divided among four existing employees -- two in their 60's, one in his 40's and one part-time employee in her 30's.

After the RIF, 77 employees remained in Salami's subdivision. Six were in their 70's; 13 were in their 60's (including several older than Salami); 19 were in their 40's; 19 were in their 50's; 9 were in their 30's; and 11 were in their 20's.[5]

Appellants' evidence of discriminatory intent

Appellants point to the following evidence of discriminatory intent:

Sperka

In approximately July 2011, Sperka overheard CEO Wanda Austin say, "Look at all of the handicapped parking spaces we have. That tells you what kind of employees we have."[6] During

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[5] Appellants' recitation of Salami's employment history suffers from the same defect as Sperka's. Appellants cite only Salami's declaration, vaguely noting his "extensive education, experience and job history." Appellants also note that "[n]otwithstanding Aerospace's reliance on bin ranking as the primary selection criterion for the RIF, Salami's bin ranking was higher than at least two younger employees who were not terminated." As support for this statement, appellants cite Salami's own declaration.

[6] Aerospace objected to this testimony as double hearsay. In fact, Aerospace objected to much of Sperka's evidence of intentional discrimination as inadmissible. However, the trial court did not expressly rule on Aerospace's evidentiary objections.

November 2011, Sperka was told by Michelle Dobard-Anderson, an engineering specialist, of Dobard-Anderson's conversation with an administrator to Vice President Rami Razouk. Sperka was told that Razouk had told the administrator, who then told Dobard-Anderson, that Aerospace was conducting a RIF in which they would target older employees and throw in some younger employees as well.

During February 2012, Sperka's supervisors, Gura and Cantrell, each independently asked her about her retirement plans. Sperka advised them that she needed medical insurance because she was in remission for stage 4 cancer. Sperka was 62 years old when she found out she was being laid off in March 2012.

Salami

Salami pursued rehire. He ensured that his name was on the rehire roster, submitted his resume and applied for at least 11 jobs for which he believed he was qualified.[7]

Salami indicates that he was personally subjected to discriminatory treatment during 2011, including a threat by Winer to impose a pay cut or have him fired. Salami was terminated at the age of 63.

Appellants refer generally to Christopher's statements about the rising costs of medical insurance, and the general

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[7] Aerospace disputes Salami's assertion that he was qualified for the jobs for which he applied. Aerospace indicates that Salami presented no evidence of his alleged qualification for those positions, which were not in Salami's former subdivision.

proposition that older employees are paid higher salaries, that he made in response to specific questions at his deposition.[8]

Appellants' statistical evidence

After the terminations of Sperka and Salami in 2012, the union filed grievances on their behalves. A statistical analysis was provided by Mark Simpson, the union president. Simpson opined that the 2012 RIF "had a severe impact on primarily on [*sic*] workers over 50 years of age." Simpson further stated, "Since the March 2012 RIF, I am aware that the company has hired literally hundreds of persons, including scores of engineers and scientists, yet to my knowledge only one person who was laid off in the RIF has been rehired." Simpson attested that he had reported the disparate impact assessment to human resources, and that "[t]he company did not investigate this claim in that they did not ask for a copy of the analysis nor ask me questions about it."

PROCEDURAL HISTORY

Appellants file complaints with the Department of Fair Employment and Housing (DFEH)

After appellants were laid off, they each separately filed a claim with DFEH.

Sperka

Sperka filed her claim with DFEH in October 2012. Sperka alleged discrimination based on race, age, and disability. Sperka's claim read:

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[8] Aerospace states that appellants take these statements out of context. Aerospace states that Christopher was merely acknowledging general propositions posed to him at his deposition, and the statements had no connection to the RIF selection.

> "I. On or about May 31, 2007, I was hired as an Engineering Specialist. During my employment I informed my employer that I am a person with a disability. On or about March 29, 2012, I was laid off, but a younger non-Caucasian employee was retained to work on my project when I was the expert on the subject matter.
>
> "II. David Christopher, Subdivision Manager, communicated the lay off to me stating it was part of a companywide rift [s*ic*].
>
> "III. I believe I was discriminated because of my race (Caucasian) in violation of Title VII of the Civil Rights Act of 1964, as amended, my age (62 yrs.) in violation of the Age Discrimination in Employment Act of 1967, as amended, and my disability in violation of the Americans with Disabilities Act of 1990, as amended."

Sperka received an immediate right-to-sue letter from the DFEH, and her case was closed. The United States Equal Employment Opportunity Commission (EEOC) later also issued a right-to-sue letter and closed her case.

Salami

Salami filed his complaint with DFEH in March 2013. Thereafter, he amended his DFEH complaint twice -- in March 2013 and May 2013. Salami alleged that he experienced discrimination based on age, ancestry, color, race, and religion. He also alleged harassment. Salami alleged that Aerospace's act of laying him off was an act of discrimination. Salami alleged that his layoff was in violation of the agreed-upon procedures between Aerospace and the worker's union. Salami's DFEH

complaint also detailed allegedly harassing conversations between him and Winer.[9]

In February 2014, prior to issuing its right-to-sue notice, DFEH sent Salami a letter saying that "based on an analysis of the facts and circumstances . . . alleged," his complaint would be closed. Salami was advised to provide additional information within 10 days if he disagreed with the DFEH determination. The letter added:

> "The investigation revealed the respondent had a reduction in force which resulted in laying off three hundred employees, of different ages, ancestry, color, race and religion. You were informed March 29, 2012, that you were selected for the reduction in force because you were among the lowest ranked employee's [*sic*] in the Communication and Network. The remaining employees 6 were in their 70's fifteen in their 60's several were older than you; twenty-one employees in their 50's; eighteen in their 40's, nine employees in their 30's and eleven employee's [*sic*] were in their 20's this would not prove a violation of the Fair Employment and Housing Act. Furthermore, of those employees that remained after the RIF, three were African-American, one was Hispanic and several were Asian-American. In addition, Aerospace's Chief Executive Officer and its General Counsel are both African-American."

Salami received a notice of case closure and right-to-sue letter in March 2014. Salami was informed that the investigation

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[9] Appellants do not address on appeal any of Salami's complaints of harassment, thus he has forfeited any harassment claim.

was dismissed because DFEH was unable to conclude that any violations of law had occurred.

Appellants' complaints

Sperka

On August 22, 2014, Sperka and former employee Cvetanovic, filed their original complaint against Aerospace, alleging a single cause of action for harassment, discrimination, and retaliation on the basis of age under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Neither alleged any disparate impact claims in the complaint.

After amending their complaint once, on October 22, 2015, Sperka and Cvetanovic filed a second amended complaint (SAC) with a new cause of action for disparate impact age discrimination in addition to their previous FEHA and related claims. For the first time, Sperka alleged that Aerospace "unlawfully terminated [her] and numerous other employees over the age of 40 . . . based on facially-neutral company policies and procedures." Sperka also asserted claims for intentional age discrimination and intentional discrimination based on disability and medical condition.

Salami

Salami filed his complaint in March 2015, asserting a claim for intentional age discrimination. In his first amended complaint, filed in September 2015, Salami alleged a cause of action based, in part, on allegations of disparate impact. Specifically, Salami alleged that "Defendants [*sic*] reduction in force had a disparate and disproportionate impact on persons over fifty years of age." In addition to his age discrimination claims, Salami also asserted claims for failure to prevent

discrimination under FEHA, unfair competition, and wrongful termination in violation of public policy.[10]

Dismissal of disparate impact claims

Sperka

Aerospace demurred to Sperka's disparate impact claim on the ground that she had not satisfied the statutory prerequisite of filing that claim with DFEH. Sperka did not oppose the demurrer.[11]

The trial court sustained the demurrer without leave to amend, holding that Sperka had failed to administratively exhaust a disparate impact claim.

Sperka subsequently filed a third amended complaint (TAC) asserting claims for intentional discrimination under FEHA based on age and medical condition.

Salami

Aerospace moved to strike Salami's disparate impact allegations due to his failure to exhaust his disparate impact claim. Salami opposed the motion, arguing that notwithstanding the absence of any disparate impact claims in his DFEH complaint, the complaint encompassed such claims, as evidenced by DFEH's investigation of disparate impact. The trial court rejected this argument and struck Salami's disparate impact allegations.

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[10] Salami did not include any claims for religious, national origin, or race discrimination.

[11] Cvetanovic, then Sperka's co-plaintiff, did oppose the demurrer, but only on his own behalf.

Summary judgment

Aerospace moved for summary judgment on both Sperka's and Salami's remaining claims. Aerospace argued that Sperka and Salami could not establish a prima facie case of age discrimination. In each case, the trial court determined that the plaintiff failed to establish any triable issue of material fact and Aerospace was entitled to judgment as a matter of law.

Sperka

In seeking summary judgment on Sperka's claims for disparate treatment age discrimination and disability discrimination, Aerospace pointed out that it was Sperka's obligation to first demonstrate a prima facie case. To show a prima facie case of age discrimination, Sperka was required to provide admissible evidence that: (1) she was terminated; (2) she was over 40 at the time of termination; (3) she was satisfactorily performing her job at the time of termination; and (4) there is some other evidence of differential treatment due to her age, such as younger, similarly-situated employees being treated more favorably. (Citing *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 (*Hersant*).) Aerospace argued that, given her negative APIPs and her difficulty maintaining a full billable workload, she was not performing satisfactorily at the time of the RIF. Further, Aerospace argued, Sperka had no evidence that she was treated differently from other employees based on her age. Finally, Aerospace argued that even if she established a prima facie case of age discrimination, she could not establish that Aerospace's non-discriminatory reasons were actually pretext for discrimination.

As to Sperka's medical condition, Aerospace argued that Sperka could not establish a prima facie case because she was not

satisfactorily performing her job at the time of her termination and had no evidence of differential treatment. Further, Sperka could not show that Aerospace's non-discriminatory reasons for her termination were pretextual.

Sperka opposed the motion as to both her age discrimination and medical condition discrimination claims. She argued that there was evidence that she was performing competently; that there was evidence of discriminatory motive; and that there was evidence of pretext. The trial court disagreed, granting Aerospace's motion for summary judgment for the reasons set forth in Aerospace's motion.

Salami

Aerospace moved for summary judgment on Salami's remaining claims against Aerospace, making arguments similar to those made as to Sperka. Aerospace argued that Salami could not establish a prima facie case because he could not establish that he was adequately performing his job at the time of the RIF and had no evidence of differential treatment due to his age.

Salami opposed the motion, arguing that he was an excellent employee and that the negative comments in his APIPs were false. Salami argued that his low workload was due to Winer's refusal to give him work. Salami claimed a general conspiracy to wrongfully withhold work and make him look bad. Salami also disputed Aerospace's assertion that the RIF was necessary.

Finding that Salami had failed to establish the existence of a triable issue of fact as to his claim of age discrimination, the trial court granted Aerospace's motion for summary judgment for the reasons set forth in Aerospace's motion.

Appellants' appeals

On January 25, 2018, Sperka filed her notice of appeal from the judgment entered against her.

On February 6, 2018, Salami filed his notice of appeal from the judgment entered against him.

On October 24, 2018, this court ordered the two appeals be consolidated for the purposes of briefing, oral argument, and decision.

DISCUSSION

Appellants challenge the rulings as to their disparate impact claims, which were determined on demurrer and motion to strike, as well as their disparate treatment claims, which were decided on summary judgment. Each ruling at issue is discussed separately below.

I. Disparate impact age discrimination claims

While Sperka and Salami's disparate impact claims were determined by means of different motions, the rationale was the same. Sperka and Salami failed to administratively exhaust such claims because neither had asserted such a claim in a complaint filed with the DFEH within one year of the alleged wrongful act. (Gov. Code, §§ 12960, 12965, subd. (b); see also *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 153 (*Wills*) ["[An] employee must file an administrative complaint with DFEH identifying the conduct alleged to violate FEHA"].) Administrative exhaustion is a jurisdictional prerequisite and any claims that were not administratively exhausted are barred as a matter of law. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (*Okoli*).)

A. Sperka has forfeited her argument by failing to oppose Aerospace's demurrer or otherwise seek relief from the trial court's order in the trial court

Aerospace filed a demurrer in the trial court as to Sperka's disparate impact claims, arguing that Sperka had failed to administratively exhaust such claims and they were therefore barred. Sperka did not oppose the motion, although appellants neglect to mention this in their opening brief.

In appellants' reply brief, appellants argue that the trial court abused its discretion by sustaining the demurrer without leave to amend "when Sperka had been without counsel at the time the demurrer was briefed, had not filed any opposition to the demurrer and had only recently obtained counsel the week before the hearing." However, there is no indication in the record that Sperka's new counsel asked that the court reconsider its ruling, provide relief from its ruling, or provide leave to amend on the ground that Sperka was without counsel at the time the demurrer was briefed. Sperka provides no explanation as to why she did not take such action in the trial court. Appellants cite no authority for the proposition that we may, at this stage, reverse a ruling that was never sought in the trial court. "'[T]he absence of an adverse ruling precludes any appellate challenge.' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 259.)

B. The trial court did not err in determining that Salami's DFEH charge did not encompass disparate impact allegations

Salami is in a different position from Sperka. Salami opposed Aerospace's motion to strike his disparate impact allegations. Therefore, we address the merits of Salami's argument.

1. Applicable law and standard of review

Salami's claims for disparate treatment age discrimination, and disparate impact age discrimination, are FEHA-related claims. Disparate treatment age discrimination is prohibited under Government Code section 12940, which prohibits an employer from directly discriminating against an employee on the basis of age, among other things. Disparate impact age discrimination is prohibited under Government Code section 12941, which specifies that the "disparate impact theory of proof" may be used in claims of age discrimination.

Before filing a lawsuit on a FEHA-related claim, a plaintiff must exhaust his administrative remedies by filing a complaint with DFEH within one year of the allegedly unlawful act. (Gov. Code, § 12960; *Wills, supra*, 195 Cal.App.4th at p. 153.) The DFEH complaint must name the perpetrator(s) and "set forth the particulars" of the alleged unlawful practice. (Gov. Code, § 12960, subd. (b).) Thus, before suing on an alleged unlawful act, a claimant must have specified that act in the DFEH complaint. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.) A claim in a civil complaint is administratively exhausted if it is like or reasonably related to the plaintiff's DFEH complaint, or if it was likely to be uncovered in the course of a DFEH investigation. (*Okoli, supra*, 36 Cal.App.4th at p. 1617.) The more specific the original charge, the less likely that expansion of the charge will be allowed. (*Ibid.*)

While neither party has cited any state case law on the subject, federal law suggests that a disparate impact claim under FEHA must be independently exhausted with the DFEH even

when a disparate treatment claim is exhausted.[12] (*Brown v. Puget Sound Elec. Apprenticeship & Training Trust* (9th Cir. 1984) 732 F.2d 726, 730 [investigation of plaintiff's disparate impact claims would not have encompassed her claim of intentional discrimination]; *Goethe v. Cal.* (E.D.Cal. Feb. 20, 2008, Civ. 2:07-CV-01945-MCE-GGH) 2008 U.S.Dist. Lexis 16164, *18-19 [dismissing disparate impact claim because "[p]laintiff pled no facts within his EEOC Charge that would have reasonably led to an investigation of a disparate impact claim"]; *Santos v. Panda Express, Inc.* (N.D.Cal. Dec. 3, 2010, Civ. C 10-01370 SBA) 2010 U.S.Dist. Lexis 127788, *12 ["federal courts in general have concluded that an administrative charge that only alleges a discrimination claim based on disparate treatment is insufficient to exhaust a claim for disparate impact -- and vice-versa"].)

Here, Salami's claim for disparate impact age discrimination was eliminated after the trial court granted Aerospace's motion to strike. A motion to strike "challenges the legal sufficiency of the complaint's allegations, which are presumed to be true. [Citation.]" (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53.) In determining whether Salami's DFEH complaint was "like or related to" his later allegation of disparate impact, we review the facts in the record to determine

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[12] Because the objectives and wording of the comparable federal laws (title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act; and the Americans with Disabilities Act) are similar to those of the FEHA, California courts often look to federal decisions interpreting those decisions for assistance in interpreting the FEHA. (*Reno v. Baird* (1998) 18 Cal.4th 640, 647-648.)

whether there is evidence that the plaintiff administratively exhausted his claim or if such a claim "'could reasonably be expected to *grow out of an EEOC investigation* of the charge. [Citation.]' [Citation.]" (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 267.) In doing so, we construe the administrative charge liberally. (*Ibid.*)

2. Salami's DFEH complaint

Salami filed his DFEH complaint on March 18, 2013, modified it on March 26, 2013, and corrected it on May 23, 2013. His complaint alleged discrimination and harassment on the basis of age, ancestry, color, race, and religion. Salami alleged that he was "Asked impermissible non-job-related questions, Denied a good faith interactive process, Denied a work environment free of discrimination and/or retaliation, Denied or forced to transfer, Denied promotion, Denied reinstatement, Laid-off."

In an attachment captioned "Complaint Details," Salami breaks down his complaint into five categories: discrimination; harassment; promotion denied; libel; and humiliation and embarrassment.

In his section on discrimination, Salami alleged that "Laying me off was an act of discrimination." He cited specific reasons. The first reason was that he could perform the job better than most. In support of this, Salami included a chart documenting his education and experience as compared to that of other employees. Salami also claimed that laying him off was an act of discrimination because he worked on more programs than most of the other people in his department, that he was the only one qualified to do his job, and that the job he was doing at the time of the layoff was given to less qualified individuals. In this

portion of his complaint, Salami specified that his layoff was in violation of the agreed-upon rules between Aerospace and the union for selecting candidates to lay off.

In the section on harassment, Salami details incidents when his manager, Winer, called him into his office to discuss things such as continuous learning, informal coaching, and to discuss the failed opportunity in Omaha. In the section on "promotion denied," Salami discusses various instances where he sought to discuss his "overdue promotion." This section describes conversations between Salami and Winer regarding Salami's efforts to secure a "JO" or Job Order. Salami states that he did not have trouble securing a JO and offered to help other employees secure JOs. Salami indicated he was being unfairly treated by being required to secure JOs when others were not.

In the section "Libel," Salami indicates that one of his customers lied and said she had not assigned Salami work for the year, yet Salami was charging for it. Salami said it was untrue, and suggests that the customer was conspiring with Salami's manager. He also suggests that his manager placed him with a customer who would "rate [him] down" no matter what. In the "Humiliation and Embarrassment" section of his complaint, Salami describes an incident in which he went to work in another division and applied to work there. While the director told Salami he wanted him, it was disapproved by upper management. In addition, Salami was required to give up his "safe security" when he needed it for work. Salami writes that a member of the support staff was sent to tell him he would be using the same security as his manager, which, Salami alleged, is in violation of the law. Salami appears to allege some sort of

conspiracy between management and support staff to try to get him to leave.

3. Salami's DFEH complaint was not sufficient to exhaust his disparate impact allegations

The questions we must answer are (1) whether Salami's DFEH complaint was like or reasonably related to his claim of disparate impact age discrimination; and (2) whether a disparate impact age discrimination claim could reasonably be expected to grow out of an investigation of the DFEH complaint. As set forth below, we conclude that the answer to these questions is no, and Salami's DFEH complaint failed to exhaust a claim of disparate impact age discrimination.

There is a "distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact." (*Raytheon Co. v. Hernandez* (2003) 540 U.S. 44, 52.) Disparate treatment, which Salami alleged in his DFEH claim, "'is the most easily understood type of discrimination.'" A disparate treatment claim exists when an "'employer simply treats some people less favorably than others'" because of their protected characteristic. (*Ibid.*) "By contrast, disparate-impact claims 'involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.' [Citation.]" (*Ibid.*) Under a disparate-impact theory of discrimination, an employer's practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate. (*Id.* at pp. 52-53.) "[C]ourts must be careful to distinguish between these theories." (*Id.* at p. 53.)

Salami's DFEH complaint was not like or related to a disparate impact age discrimination claim. At no time did Salami allege a facially neutral policy that fell more harshly on individuals above the age of 40. In contrast, Salami alleged that Aerospace's actions *violated* the rules and policies in place. Further, Salami's DFEH complaint overwhelmingly suggests a specific intent to discriminate against him, including various conspiracies against him that involved violations of rules or laws. In short, Salami's DFEH complaint cannot be interpreted to support a theory based on a facially neutral policy that simply fell more harshly on older employees.

For the same reasons, Salami's disparate impact age discrimination claim was not likely to be uncovered during the course of a DFEH investigation of his complaint. Salami's complaint gave DFEH no reason to believe that a neutral policy was in place which affected a single group more harshly than others. On the contrary, Salami suggested that any fair rules in place regarding the manner in which layoffs should proceed were being violated -- specifically for the purpose of discriminating against him. Salami's DFEH complaint alleged intentional, unfavorable treatment that was specific to him individually.

Salami argues that, based on language contained in a letter from DFEH, DFEH "conducted at least some investigation" into a potential disparate impact theory. Salami takes the position that because DFEH undertook an investigation into a disparate impact claim, his DFEH notice must have been sufficient to have triggered such an investigation. The language that Salami focuses on in support of this argument is contained in a letter captioned "Closure Determination and Request for Additional Information," which states:

> "1. The investigation revealed the respondent had a reduction in force which resulted in laying off three hundred employees, of different ages, ancestry, color, race and religion. You were informed March 29, 2012, that you were selected for the reduction in force because you were among the lowest ranked employee's [*sic*] [in] the Communication and Network. The remaining employees 6 were in their 70's fifteen in their 60's several were older than you; twenty-one employees in their 50's eighteen in their 40's, nine employees in their 30's and eleven employee's [*sic*] were in their 20's this would not prove a violation of the Fair Employment and Housing Act."

Salami fails to explain how this language can be read to apply to a disparate impact, as opposed to a disparate treatment, age discrimination claim. We disagree with Salami's characterization of these facts as suggesting that DFEH in fact investigated the issue of disparate impact, as opposed to his clearly articulated claims of disparate treatment. An essential element of Salami's disparate treatment age discrimination claim was that he show evidence of differential treatment due to his age, such as younger, similarly-situated employees being treated more favorably. (*Hersant, supra*, 57 Cal.App.4th at p. 1002.) The evidence quoted in DFEH's letter to Salami indicates that DFEH investigated his claim of disparate treatment, and determined that Salami was included in the RIF due to his low performance ranking. Evidence of the number of employees not included in the RIF who were Salami's age or older undermines his disparate treatment claim, as it shows that younger employees were not treated more favorably. Salami has failed to convince us that the quoted language must be interpreted as an actual investigation of

a disparate impact claim. Based on Salami's DFEH claim, it is unlikely that such a claim would have been uncovered in the course of the DFEH investigation.

Because Salami did not exhaust his administrative remedy as to his disparate impact age discrimination claim, the motion to strike was properly granted.

II. Disparate treatment age discrimination claims

A. Applicable law and standard of review

We review de novo a trial court's decision granting summary judgment. (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1515.) In doing so, we employ the same process as the trial court in determining whether summary judgment was appropriate. (*Ibid.*) First, the party moving for summary judgment has a burden to show that the plaintiff cannot establish one or more elements of the plaintiff's cause of action. (Code Civ. Proc., § 437c, subds. (o)(1), (2), & (p)(2).) The party opposing the motion must then present evidence creating a triable issue of fact as to that cause of action. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.) The facts alleged by the party opposing summary judgment, and the reasonable inferences therefrom, must be accepted as true. (*Ibid.*)[13]

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[13] As set forth above, Aerospace objected to much of appellants' evidence presented in the trial court. The trial court did not expressly rule on Aerospace's objections. Aerospace has renewed those objections in this court, but, for the majority of such objections, does not provide particularized legal discussion. We decline to directly address Aerospace's evidentiary objections that are not discussed in any detail. (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1322, fn. 5 [where party does

To prevail on a FEHA age discrimination claim, a plaintiff has the initial burden to establish a prima facie case of discrimination. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) To establish a prima facie case, the plaintiff must generally show that: (1) he was a member of a protected class; (2) he was qualified for the position he sought or was performing competently in the position he held; (3) he suffered an adverse employment action, such as termination; and (4) some other circumstance suggests a discriminatory motive. (*Id.* at p. 355.)

If the employee establishes a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption by providing evidence that "its action was taken for a legitimate, nondiscriminatory reason. [Citations.]" (*Guz, supra*, 24 Cal.4th at pp. 355-356.) Reduction in workforce, or downsizing, is a legitimate reason to terminate an employee, as long as the employer does not use the occasion to eliminate its older workers. (*Id.* at p. 358.) However, as long as they are nondiscriminatory, an employer's true reasons for an employee's termination "need not necessarily have been wise or correct."

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not offer legal analysis or argument in support of a general assertion, we may consider the argument waived].) As appellants point out, the one objection Aerospace discusses in some detail is its objection to appellants' statistical evidence. However, because we have determined that appellants' disparate impact claims were properly disposed of at the pleading stage, we have no occasion to rely on appellants' statistical information. As set forth in this discussion, appellants have failed to provide sufficient evidence supporting their claims for disparate treatment age discrimination as a matter of law, regardless of their statistical evidence.

(*Ibid.*) Thus, to prevail on an age discrimination claim after an employee has established a prima facie case, the employer must provide "reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*. [Citations.]" (*Ibid.*) The ultimate issue is "simply whether the employer acted with *a motive to discriminate illegally*." (*Ibid.*)

B. Appellants could not establish prima facie cases of age discrimination

To meet its initial burden of proof on summary judgment, Aerospace argued, among other things, that appellants could not establish prima facie cases of age discrimination because they could not establish the second element of such a claim: that they were performing competently in their positions.[14]

Appellants do not attempt to systematically establish the elements of a prima facie case of age discrimination. In particular, appellants do not argue that they can create triable issues of fact as to the issue of competent performance. They provide no objective evidence contradicting Aerospace's evidence showing that appellants were not performing competently in their respective positions. Thus, appellants cannot meet the second required element of their prima facie cases. Each appellant's individual case is discussed below.

Sperka

In her statement of facts, Sperka addresses her career experience and history at Aerospace. She provides a general

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[14] As discussed in detail above in the factual background section, appellants each had serious performance problems which ranked them in bins 4 and 5, the lowest rankings, prior to their termination.

reference to her own declaration, which detailed her 28 years of defense contractor experience. She disputes the evidence that she had insufficient clients and limited experience. She characterizes the criticisms in her APIPs as "unfair" and "taken out of context." Appellants make the general statement that "Sperka was performing her duties satisfactorily and did not fall short on expectations." However, there is no citation to the record supporting this statement.

Sperka's own evaluation of her competence does not create a triable issue of fact. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 816 (*Horn*) ["an employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact"].) In the absence of any evidence, other than her own declaration on the issue of whether she was performing competently, Sperka cannot establish a prima facie case of discrimination. Thus, summary judgment was properly granted.

Salami

Salami's prima facie case suffers the same failing. He personally disputes the facts submitted by Aerospace documenting his poor performance. Salami indicates that the bin rankings were "subjective" and that his bin ranking was higher than at least two younger employees who were not terminated.[15]

Salami's own opinion does not create a triable issue of fact as to whether he was performing competently. (*Horn, supra*, 72 Cal.App.4th at p. 816.) In the absence of any other evidence on

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[15] Salami does not explain how, with the lowest bin ranking of 5, his ranking could have been higher than any other employee.

this point, Salami fails to establish a prima facie case of discrimination, and summary judgment was properly granted.

C. Aerospace provided evidence of a legitimate, nondiscriminatory reason for the adverse employment actions

An employer may prevail on summary judgment if the employer can show legitimate reasons, unrelated to bias, as to why it eliminated the employee. (*Guz, supra*, 24 Cal.4th at p. 357.) An employer is entitled to summary judgment if, "considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at p. 361, fn. omitted.)

Here, Aerospace was entitled to summary judgment on the alternative ground that it provided competent, admissible evidence of legitimate, non-discriminatory reasons for appellants' terminations. Appellants acknowledge that their terminations occurred simultaneously with more than 300 other Aerospace employees as part of a company-wide RIF. Aerospace submitted a declaration of its Senior Vice President of Operations and Support, that the RIF was necessitated by "projected DOD budget cuts that would significantly impact Aerospace's funding" and "was expected to affect roughly 10 percent of the workforce." Contrary to appellants' arguments, Aerospace was not required to show that its prediction regarding funding was correct. (*Guz, supra*, 24 Cal.4th at p. 358 [if nondiscriminatory, employer's "true reasons need not necessarily have been wise or correct"].) However, Aerospace points out that it did provide evidence that its revenue decreased by more than $30 million in both 2012 and 2013.

The evidence in the record further shows that Aerospace conducted the RIF in compliance with the CBA and the CBA-sanctioned bin ranking system. Appellants failed to produce evidence to the contrary. Further, there was no evidence that the RIF selection matrix, used by managers to conduct a more detailed evaluation, contained any discriminatory criteria.[16]

Aerospace made a sufficient showing that its reasons for terminating appellants were manifestly unrelated to intentional age bias against appellants. (See, e.g., *Guz, supra,* 24 Cal.4th at p. 360.) Appellants failed to show triable issues of fact that the decisions leading to their termination were actually made on the prohibited basis of age. Thus, summary judgment for Aerospace was properly granted.

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[16] Appellants argue for the first time on appeal that Aerospace failed to comply with various aspects of the CBA in conducting the RIF. Appellants fail to provide a citation in the record showing that these arguments were raised in opposition to summary judgment below, therefore the arguments are waived. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486 ["[p]oints not raised in the trial court will not be considered on appeal"].) Further, even if appellants had raised a violation of the CBA, such claim would be preempted by federal law to the extent that it involved an interpretation of the CBA. (*Newberry v. Pacific Racing Asso.* (9th Cir. 1988) 854 F.2d 1142, 1146 [federal law displaces any state cause of action for violation of a collective bargaining agreement]; *Lingle v. Norge Div. of Magic Chef* (1998) 486 U.S. 399, 413 [application of state law preempted where application requires an interpretation of a collective bargaining agreement].)

III. Sperka's disability discrimination claim

Sperka's disability discrimination claim is subject to the same burden-shifting framework and summary judgment standards discussed above as to the age discrimination claims. (See *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.)[17] It is undisputed that Sperka was a cancer survivor, thus she was in a protected category.

However, Sperka's discrimination claim based on her medical condition fails for the same reasons that her age discrimination claim failed. She did not provide evidence that she was performing competently at the time of her termination. Nor did she provide specific evidence of discriminatory intent. In fact, she was recruited to Aerospace by her former supervisor, who was well aware that Sperka was a cancer survivor. Sperka failed to cite evidence which sufficiently demonstrated any discriminatory intent. Further, Aerospace offered a legitimate, non-discriminatory reason for her termination. Under the circumstances, summary judgment was properly granted. (See *Guz, supra,* 24 Cal.4th at pp. 358-360.)

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[17] As Aerospace points out, while Sperka characterizes this as a claim for disability discrimination, she relies on Government Code section 12940, subdivision (a), which prohibits discrimination based on, among other things, medical condition. Thus, her claim technically appears to be for medical condition discrimination, not disability discrimination. However, the label of a cause of action is not significant. (*Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281.)

DISPOSITION

The judgments are affirmed. Respondent is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT